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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 192

HI HAT ELKHORN COAL COMPANY, a Corporation,
Petitioner,

vs.

TED NEWMAN,
Respondent.

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 1052

HI HAT ELKHORN COAL COMPANY, a Corporation,
Petitioner,

vs.

TED NEWMAN,
Respondent.

BRIEF FOR RESPONDENT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Hi Hat Elkhorn Coal Company, seeks certiorari on the sole ground that the Court of Appeals of the Sixth Circuit has decided an important state (Kentucky) question in a way in conflict with applicable state law, under Rule 19(1)(b). Respondent Ted Newman disagrees.

Statement of the Case

The dispute received its legal baptism in the state trial court in an action by Newman against Hi Hat's predecessor.

In 1956 Hi Hat's predecessor constructed a large coal washing and processing plant on Newman's surface. Hi Hat contends its lease of the coal on the Newman mineral

tract so required and the Newman coal had to be processed for market.

Newman has always conceded the use of his surface for washing and otherwise processing coal *mined from the Newman mineral tract.* He concedes also the right to dump washer refuse from coal mined from the Newman mineral tract as an incident thereto. But he has always contended, and the Kentucky court holds rightly so, that the coal washing and processing must be confined to Newman coal.

Newman was not advised of the nature of the use of the processing plant, and he naturally assumed it would be properly used. Yet, after completion Newman discovered coal mined as far as fifteen miles away being processed through the plant. This practice developed to the point where most of the coal processed was coming from distant points unconnected with the Newman mineral tract. Large quantities of muck and other refuse from the washer were dumped on Newman's surface. Newman promptly filed suit in the Circuit Court for Floyd County, Kentucky, seeking damages for so using his land and the injury thereto from dumping refuse. (18a, 19a).

A trial ensued, with the state trial court holding (1) the coal company had the right to construct and operate the washer for Newman coal, and (2) directed the jury to award damages for that part of the washer refuse coming from outside coal.

The coal company appealed, contending it had the right to wash and otherwise process coal from outside the Newman mineral tract, and argued that the dumping of refuse from the washer was a necessary incident thereto. The Court of Appeals of Kentucky rejected this position. *Hi Hat Elkhorn Mining Company* v. *Newman, Ky.*, 352 SW2d 71.

The state trial court held Newman failed to prove his

damages adequately to recover for the use of his land for processing outside coal to August 1, 1959, and directed the jury not to award any damages therefor. Newman did not appeal.

After the state trial but before the state appellate decision, the coal company sold the lease, processing plant and other properties to Hi Hat. Newman filed a suit against Hi Hat in the state court seeking a declaration of rights and damages. Hi Hat removed the case to the District Court and continued to use Newman's land for processing of outside coal and dumping of washer refuse. The District Court disagreed with the state trial court and upheld Hi Hat. The Court of Appeals of Kentucky later decided contrary to the District Court. The Court of Appeals for the Sixth Circuit necessarily followed the Kentucky Court of Appeals, reversing the District Court. Hi Hat contends the Court of Appeals erred in reversing the District Court, raising the same questions argued before the Kentucky Court of Appeals and the Court of Appeals for the Sixth Circuit.

Argument

Question i.

The Petitioner here, as in the various courts before, asserts as its principal contention that it has the right to use Newman's surface to process coal from other lands.

Hi Hat's predecessor so contended in the Kentucky Court of Appeals to avoid assessment of damages for dumping washer refuse from outside coal on Newman. The argument ran that it had the right to wash and otherwise process outside coal; therefore, it had the right to dump refuse therefrom as a necessary incident thereto. Conceding that the right to dump processing plant refuse would follow as a necessary incident to the lawful operation thereof, the

Kentucky court rejected the basic premise, i.e. the right to process outside coal. In the language of that court:

> "Appellant's principal contention is that under a standard mineral deed it could legally process coal and dump refuse on appellee's land regardless of the source of the coal. The right to do so, if it exists, arises from a provision of the mineral deed which permits appellant to use the surface of appellee's land 'for the removal over and through said land, (of) the products taken out of any other land owned or hereafter acquired' by appellant. That such a provision does not give the right contended for was decided in *Pike-Floyd Coal Co.* v. *Nunnery*, 232 Ky. 805, 24 SW2d 614." 352 SW2d at 72.

The decision of the highest court in Kentucky was properly followed by the Court of Appeals. We believe the decision sound. But even if it were not, it is directly in point, decisive and binding on this court.

Question ii.

The alleged estoppel against Newman is clearly untenable. Hi Hat says it constructed the processing plant to process Newman coal. It says it had to, by contract and economics. Newman concedes the right to do so.

After construction, Hi Hat decided to process outside coal. Newman knew nothing of this illicit intention (18a, 19a). He did not object to construction, assuming a legitimate intended use. He objected promptly after learning the illegal nature of the use. The Court of Appeals correctly decided the issue.

Question iii.

The claim of *adverse possession* is astounding. The processing plant was constructed in 1956 and fifteen years adverse possession is required in Kentucky to divest Newman of title.

Prior to 1956, Hi Hat's predecessors were engaged solely in transporting outside coal, which it had a right to do. The grant expressly authorized the use of Newman's land for the removal of coal from other lands. Its possession and use of Newman's surface to 1956 was consistent with its rights and clearly not adverse. But when Hi Hat started using Newman's surface for *processing* in addition to *transportation*, it violated Newman's rights and its use became adverse.

Clearly, adverse use of Newman's surface for processing since 1956 did not ripen into an easement therefor in the short interval before suit was filed.

Question iv.

The state trial court had before it Newman's claim against Hi Hat's predecessor for damages to August 1, 1959—the date of Hi Hat's purchase. The basis for damages was wrongful use of Newman's land by processing outside coal and injury to his land from resulting refuse.

The state trial court held Hi Hat's predecessor had the right to operate the processing plant for Newman coal, and not otherwise. Newman failed to prove any measure of damages for the use of the plant for outside coal, so the jury was not permitted to award Newman any damages therefor. But Newman proved sufficient damages to go to the jury for dumping preparation plant refuse from outside coal on his land. The jury was instructed to award damages therefor, and did so.

Newman did not appeal. Hi Hat's predecessor did, and the Kentucky Court upheld the trial court's view that the processing of outside coal and dumping of refuse therefrom on Newman violated his rights.

Newman's failure of proof on damages for processing outside coal to August 1, 1959, would preclude its assertion now against Hi Hat's predecessor. But it would not militate against a claim against Hi Hat for subsequent damages. *City of Covington* v. *First National Bank of Covington*, 25 S. Ct. 562, 198 US 100, 49 L. Ed. 963. Most certainly, it could not be construed as tantamount to a decision that Hi Hat's predecessor could use Newman's land to process outside coal. The Kentucky court held exactly the converse.

The most that can be said for Hi Hat's position is that Newman failed to prove any damages in that respect against Hi Hat's predecessor to August 1, 1959, and is bound by that failure. The Circuit Court of Appeals so held on the rehearing.

Conclusion

The decision complained of has been hammered out carefully by the highest court in Kentucky. The case turns on Kentucky law, and the decision of the Kentucky court on this precise question is binding here. This case is not only correctly decided under applicable state law but it is also not an important state question within the contemplation of Rule 19(1)(b). Certiorari should be denied.

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